Supreme Court, U. S.
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76-1185

IN THE

Supreme Court of the United States

..... Term, 19....

No. A-591

MAX H. HOMER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

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No. A-591

MAX H. HOMER,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on November 18, 1976, which affirmed the District Court's denial of Petitioner's Motion for a New Trial. The Petition for Rehearing was denied on December 28, 1976.

OPINIONS BELOW

The District Court for the Western District of Pennsylvania denied Petitioner's Motion for New Trial by Opinion on issues not raised in the Third Circuit (Appendix). The Third Circuit Court of Appeals affirmed by Opinion (Appendix) and denied rehearing by simple order.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I. Was Petitioner denied due process by the Trial Court's refusal to permit him to call nine (9) witnesses, each of whom would have testified that the witness was told in 1971 by the Party Treasurer that the victim of an alleged extortion by Petitioner had made a political contribution through Petitioner to the Democratic Party?

   A. Was the testimony admissible under Rule 804(b)(3) as a declaration against penal interest?

   B. Was the testimony admissible under Rule 804(b)(3) as a declaration against pecuniary or proprietary interest within the meaning of Rule 804(b)(3)?

   C. Was the testimony admissible under Rule 803(24) and Rule 804(b)(5) of the Federal Rules of Evidence?

II. Was Petitioner denied due process by the Trial Court's refusal to permit Petitioner to call two (2) witnesses, each of whom would have testified that the witness had been told by political opponents of Petitioner that arrangements had been made to frame him through the use of an oil company man and a heating and air conditioning man, the identities of the alleged victims of the extortion counts of which Petitioner had been convicted?

III. Did the Trial Court err in permitting the case to be submitted to the jury on the theory of Petitioner's conduct while acting under color of official right?

STATEMENT

This matter is before the Court on appeal from the judgment and sentence of the District Court for the Western District of Pennsylvania and the affirmance by the Third Circuit Court of Appeals.

Petitioner was indicted in nine counts for three Hobbs Act, four income tax, one perjury, and one obstruction violations. Two income tax counts were severed before trial. Petitioner was acquitted of four counts and convicted of three.[1]

During the time spanned by the scope of the indictment against him, Petitioner was a State Legislator for the Stowe Rox area near Pittsburgh, Pennsylvania. Before leaving the Legislature he had served for ten years, part of that time as Chairman of the Education Committee (N.T. 1070 et seq). He had a doctorate in education and was a Superintendent of Schools for Stowe Rox by the time of trial (N.T. 1073).

Petitioner's conviction for violation of the Hobbs Act, 18 U.S.C. 1951 was predicated on evidence showing that he received six thousand five hundred ($6,500.00) dollars in money from the Gordon Oil Company while acting under color of official right in connection with Gordon's obtaining an occupancy permit for a new warehouse it had constructed in the Pittsburgh area.

Petitioner readily admitted accepting five thousand ($5,000.00) dollars as a campaign contribution unconditioned on his providing assistance in obtaining the permit (N.T. 1111). The additional one thousand five hundred ($1,500.00) dollars was undisputedly paid to

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1. Petitioner was convicted of two counts of Hobbs and one count of false declaration.

an architectural firm as fees and so recorded in Gordon's corporate books. The five thousand ($5,000.00) dollars was recorded as a contribution on the County Election Report filed in 1971. Petitioner's Trial Exhibit 3.

Petitioner's then personal attorney, Peter King, of Pittsburgh, Pennsylvania, testified at trial that he advised Petitioner to accept the five thousand ($5,000.00) dollars because it was a political contribution not conditioned on Petitioner's obtaining any occupancy permit (N.T. 985).

Petitioner was also convicted of a second Hobbs violation for obtaining three thousand ten and 92/100 ($3,010.92) dollars from another company doing business in the Stowe Rox area which had occupied a building without a proper occupancy permit (Ruthrauff, Inc.). (Ct. II) The sums alleged were never in dispute but their purpose was. Petitioner testified that he received monies from the Company President for application to the benefit of a black athletic club for uniforms and a liquor license.

Count V. related to the Gordon Oil contribution (Count I.), and charged Petitioner with making a false declaration to the grand jury in testifying he had requested the State Inspector to furnish plans to the architect in connection with an inspection of the Gordon Terminal Service Building.

The case was a cause celebre in the Pittsburgh area for months prior to indictment and through trial, as Petitioner was also Superintendent of Education for the Stowe Rox area having been defeated for State Legislator during the pendency of his federal trial. His tenure as Superintendent came under separate attack from

political opponents and together with his trial, served as the basis for continuing newspaper coverage of him.

Prior to his indictment, Petitioner voluntarily appeared before two Federal Grand Juries and testified at length with respect to the matters eventually covered in the indictment, even at a time when he knew that he was the subject of the federal investigation likely to result in the indictment of him. He took the stand at trial and as before the grand jury, insisted that he accepted monies from the companies as political contributions for having done a favor for constituents in obtaining of occupancy permits. He denied extortion by any standard and otherwise explicitly responded to the government charges. The indictment carefully charged that Petitioner acted under color of official right when accepting these monies. Petitioner's defense sought to develop through testimony that it was known that he had received a $5,000.00 contribution from the alleged victim of the Count I. extortion for use in the campaign; that the Democratic Party therefore did not have its usual fund raising affairs in 1971; and was able to run write-in candidates in the general election (N.T. 1115, 1122, 1293). (Ct. I)

Petitioner contended that the monies received from the other alleged victim were for expenditures on athletic teams in the Stowe Rox area (N.T. 1129, 1135). (Ct. II) The jury apparently accepted the fact that Petitioner *had not utilized these monies for personal gain and acquitted him* of the income tax charges based on receiving them.

Upon Petitioner's conviction and denial of his Motion for a New Trial, he was sentenced to pay total fines amounting to nine thousand ($9,000.00) dollars

and imprisoned for a period of four (4) years, concurrently on Counts I. and II. For conviction of Count V., he was imprisoned for a consecutive two (2) years to the four (4) years already imposed. His bond was continued pending his appeals.

REASONS FOR GRANTING THE WRIT

The Trial Court denied Petitioner due process by refusing to permit the defense to call nine (9) witnesses, each of whom would testified that the witness was told by Patsy Bruno, the Party Treasurer, in 1971 that Gordon Oil (victim of Count I.) had made a political contribution through Petitioner to the Democratic Party. Petitioner offered to present these nine (9) witnesses who were prepared to testify that in 1971 at the time the offenses charged in Count I., and three years before any government investigation, Bruno, the Democratic Campaign Chairman in Stowe where Petitioner was the State Legislator, told each of them that he had learned that Petitioner had received a political contribution from Gordon Oil. The telling importance of this testimony, if believed, would seem apparent. An open and well known disclosure of the receipt of monies was the core of Petitioner's defense and highly probative to his contention that such notoriety is at once utterly inconsistent with the conduct of one who is alleged to be an extorter or an income tax evader.[2]

At the time that counsel argued for the admissibility of the testimony of these witnesses (N.T. 704-

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2. Counts I. and II. charged attempted extortion. Counts VII. and IX. charged income tax evasion in failing to report these same monies as personal income.

718), the Trial Court ruled that it would permit these witnesses to be called in the event the government were to challenge the records of the County Election Bureau (N.T. 752, 1346) which showed that the five thousand ($5,000.00) dollars from Gordon Oil was reported as campaign income.[3] The government did in fact challenge this record in at least three ways.

First, in government cross-examination of Mrs. Patsy Bruno, the wife of the Party Treasurer, the prosecutor focused on the alleged normal completeness of Patsy Bruno's records (N.T. 768). He then asked a series of questions clearly implying that the election record in question was incomplete as there were no other corroborating documents and that in fact the five thousand ($5,000.00) dollars contribution listed in the County Election Report was never received by the Democratic Party (N.T. 794 et seq).[4]

Secondly, the government attacked the completeness of the party records by inference throughout the trial. This was evident not only with Mrs. Bruno (N.T. 768-799) but with Petitioner's cross-examination.

Finally, the prosecutor challenged the County Record a third time in his closing argument. His statement that Bruno's personal records showed no receipt

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3. ". . . maybe at the end if there is an attack on that we will let you bring it in." (N.T. 1346). See also N.T. 711-713. This document showed that five thousand ($5,000.00) dollars was reported as a political contribution from Gordon Oil in the 1971 election. Petitioner's Exhibit 3. The Court felt this document alone precluded presenting other evidence (N.T. 713).

4. The government specifically expressed misgivings about the authenticity of the document to the Court during oral argument. See N.T. 752.

of five thousand ($5,000.00) dollars from Petitioner or anyone else was a direct attack of the County Record (N.T. 1609-1610). Thus, the conditon precedent established by the Court for the admission of the testimony was in fact met.[5]

In any event, the Court itself conceded that the legislative history of the new Federal Rules of Evidence suggested that Congress expected to develop further exceptions to the Hearsay Rule (N.T. 709), and that there should be some relaxation of this Rule in a criminal case in the interest of justice (N.T. 813). WEINSTEIN ON EVIDENCE, Volume 1, Rule 102. Rule 102 provides that rulings should be made for among other reasons . . .

> "the promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined".

Under the circumstances it can hardly be gainsaid that inhibiting Petitioner from corroborating a critical contention of his defense, particularly where attacked by the prosecution, was infinitely crippling to his defense and violative of his due process rights since the testimony of these nine witnesses would have properly been admissible under Rules 804(b)(3), 804(b)(5), or 803(24) of the Federal Rules of Evidence.

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5. See N.T. 1337—where counsel for the third time before resting asked for the right to call the nine witnesses.

A.

The Testimony Was Admissible Under Rule 804(b)(3) as a Declaration Against Penal Interest.

It is a violation of 25 P.S. §3542 (State) and 18 U.S.C. §610 (Federal) of Election Codes, and therefore a criminal offense, for a corporation to make campaign contributions to a political party or committee. The declarant here, could be charged as an aider and abettor, or accessory to the crime committed by Gordon Oil (the victim in Count I.) in giving the five thousand ($5,000.00) dollars to a political campaign. His statements to the nine witnesses with respect to his having received the five thousand ($5,000.00) dollars would have been against his penal interest and thus admissible. If believed by the jury, it would obviously be offered to exculpate the accused, as we have already pointed out elsewhere, as it would show that he, the Petitioner, had not committed any tax or Hobbs violations as the money was immediately turned over to the Party as a political contribution.

B.

The Testimony Was Admissible Under Rule 804(b)(3) as a Declaration Against Pecuniary or Proprietary Interest Within the Meaning of Rule 804(b)(3).

Furthermore, the declarations were against the declarant's pecuniary or proprietary interest. In his individual capacity, the statement was, of course, not against that interest. But to the extent that he represented the political party, as Treasurer, his declarations that he had received five thousand ($5,000.00) dollars from a corporation and as a consequence the Party did not need to raffle or make other normally heroic fund raising efforts, necessarily served to reduce the Party's potential for acquiring additional campaign funds. Hence, it would be unlikely for him to declare the existence of a significant corporate contribution which would deter other contributions and efforts to raise funds, unless such a contribution had, in fact, been made by the corporation to the Party Campaign.

C.

The Testimony Was Admissible Under Rule 803(24) and Rule 804(b)(5) of the Federal Rules of Evidence.

The testimony could alternatively had been admitted under the provisions of Rule 803(24) or Rule 804(b)(5) as a declaration having equivalent circumstantial guarantees of trustworthiness, particularly considering the liberality with which the Federal Rules of Evidence are to be construed.

II.

The Court denied Petitioner due process by refusing to permit the defense to call two witnesses, each of whom would have testified that he had been advised by one or more of Petitioner's specifically named political enemies that arrangements had been made by them to frame Petitioner through the use of an oil company man (Gordon—County I. and V.), and a heating and air conditioning man (Laux—Count II.). The Trial Court ruled that in order to lay a foundation for the testimony of these two witnesses, it was necessary to call the political enemies (the Ciamaccos) and inquire as to whether or not they had in fact made such arrangements. Three of the Ciamaccos were called; the questions were put and each refused to answer any questions, claiming his Fifth Amendment constitutional privilege. The Trial Court then refused to allow Petitioner's two witnesses to testify with respect to what the Ciamaccos had related to them (N.T. 928, 1067).

This testimony we contend was admissible as a declaration against interest under Rule 804(b)(3) of the Federal Rules of Evidence. The Ciamaccos were unavailable under the exception of Rule 804(a)(1) providing:

> "Unavailability as a witness includes situations in which the declarant is exempted by ruling of the Court on grounds of privilege from testifying concerning the subject matter of his statement".

As the Tenth Circuit held in *Mason v. United States,* 408 F.2d 903 (10th Cir. 1969):

> "The requirement of unavailability is satisfied when the witness is physically present but the testimony is unavailable because of the invocation of the Fifth Amendment Privilege".

See also *United States v. Elmore,* 423 F.2d 775, 778 (4th Cir. 1970).

The Ciamaccos' statements if true clearly suggest criminal culpability for obstruction of justice, subornation of perjury and other possible criminal acts, and are therefore manifestly against penal interest, as provided in Rule 804(b)(3).

Moreover, this Court in *Chambers v. State of Mississippi* 410 U.S. 284 (1973), suggests that the burden placed on an accused to corroborate testimony as may be contemplated by a rule of court not be too high. See also J. WEINSTEIN & M. BERGER WEINSTEIN'S EVIDENCE, §804(b)(3) [03] at p. 804-91 (1975); and *U.S. v. Iaconetti,* 18 CR 2419 (1976), where Judge Weinstein himself analyzed Rule 803(24) in support of admissibility of hearsay witnesses. The case *sub judice* is remarkably similar to *Iaconetti.*

There, as here, the testimony, if true, was certainly relevant and offered as evidence of a material fact Rule 401.[6]

There, as here, the alleged statement was made close on the heels of the criminal event and to persons with whom it was appropriate and even necessary to communicate, factors which Judge Weinstein found to mitigate the risks of insincerity and faulty memory. Moreover, the quality of these facts were thought by him to be the equivalent in reliability to those of many of the other exceptions and superior to some in the Federal Rules permitting hearsay.

Finally there, as here, the statements of these witnesses was more probative on the point than any other evidence which the Petitioner could procure through reasonable efforts.

Indeed, Weinstein, the author, believes that the test of Rule 403 is applicable, and that the Court should only ask for sufficient corroboration to "clearly" permit a reasonable man to believe that statement might have been made in good faith and that it could be true. WEINSTEIN'S EVIDENCE, supra, at p. 804-91.

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6. Gordon's testimony that he paid Petitioner to permit his Company to open a warehouse already admittedly opened in violation of state law was the gravamen of Count I. Discrediting this testimony was of obvious importance.

III.

The Trial Court erred in permitting the case to be submitted to the jury on the theory of Petitioner's conduct while acting under color of official right. Petitioner is, of course, aware of this Court's refusal to grant certiorari in *United States v. Mazzei,* 521 F.2d 639 (3rd Cir. 1975), cert. den. 423 U.S. 1014, 96 S.Ct. 446 (1975). Nevertheless, this Court is invited to reconsider that decision where as here the Petitioner was charged with violation of Hobbs while acting under color of official right as a State Legislator.[8]

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8. Count I. charges inter alia "said consent being induced and to be induced under the color of official right".

Count II. is couched in identical language.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

GREENFIELD & MINSKY

STANLEY W. GREENFIELD,

Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the within Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit was mailed by United States Mail, Postage Prepaid, on the 25th day of February, 1977, to the Solicitor General of the United States, Department of Justice, Tenth and Constitution Avenues, Washington, D.C. 20530.

GREENFIELD & MINSKY

STANLEY W. GREENFIELD

Attorney for Petitioner

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-1395
(D.C. Criminal No. 75-227)

UNITED STATES OF AMERICA
v.
MAX H. HOMER, a/k/a MAX H. HOMER, JR.
Max H. Homer, Appellant

Petition for Rehearing by the Original Panel

Petitioner, MAX H. HOMER, respectfully represents:

1. The Court's Opinion incorrectly concludes that Appellant's offer to have nine (9) witnesses testify at trial was solely for the purpose of defending himself on income tax counts of which he was acquitted. Opinion, page 5. Thus, the Court reasoned it need not decide Appellant's proffered grounds for the admissibility of this evidence under the Federal Rules of Evidence, as this testimony might relate to his conviction on the charge of extortion. Id., page 5.

2. A plain and fair reading of the record indicates that said testimony of nine (9) witnesses was patently offered for the *twin* purposes of meeting *both* the extortion charge *and* the income tax charges against the Appellant and not only the income tax charges of which he was acquitted.

3. This Court itself observed that Appellant's Brief argues:

> "the 'open and well known disclosure of the receipt of monies was the core of appellant's defense and

highly probative [of] his contention that such notoriety is at once utterly inconsistent with the conduct of one who is alleged to be an extorter or an income tax evader.' Brief for Appellant at 9." Opinion, page 4.

4. Furthermore, government counsel, the Court and defense counsel throughout argument on admissibility of this testimony made no distinctions as fashioned by this Court. Rather, disagreement between the parties and the Trial Court turned on the substantive issues of trustworthiness, and not on relevancy to a particular charge or count.

5. Moreover, the record shows that:

(a) at 523, Appellant's initial offer of proof was made *without* distinction as to which charge (i.e. extortion or income tax) it related.

(b) at 706, a reading of the complete paragraph of counsel's comments in argument for admissibility reflects that both the extortion *and* income tax counts were being considered. Counsel's contention that the evidence was a defense to the income tax count was merely an illustration, when fairly considered in the context of the argument on the issue.

(c) at 1540 et seq, defense counsel in closing argued without objection by the government:

"Does it make sense, or does it boggle the mind to think that anybody would extort $5,000.00 or five cents and then report it on a campaign contribution form where all concede it is recorded on a public record, or is it consistent with Dr. Homer's contention that he accepted it as a campaign contri-

bution and did so because of a voluntary giving of it by the Gordon Service people?"

(d) at 1624, where the defense continues in argument that the nine (9) witnesses should have been called, no distinction between offenses (i.e. extortion or bribery) is made, nor do the government or the Court make any, all we contend because the evidence was *indeed* intended to be applicable to both charges, as all so understood it.

WHEREFORE, your Petitioner requests reconsideration of the judgment entered on November 18, 1976 so that the Court can reach the substantive issues raised in the appeal.

Respectfully submitted,

GREENFIELD & MINSKY

Stanley W. Greenfield

Attorney for Appellant/
Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of December, 1976, two (2) true and correct copies of the foregoing Petition were served upon the United States of America, by mailing said copies through the United States Mail, postage prepaid, to Appellee Attorney of Record, ROBERT PLAXICO, ESQUIRE, Government Attorney, United States Department of Justice, Appellate Section—Criminal Division, Post Office Box 899, Washington, D.C. 20044.

GREENFIELD & MINSKY

Stanley W. Greenfield

Attorney for Appellant

Appendix.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 76-1395

UNITED STATES OF AMERICA

v.

MAX H. HOMER a/k/a Max H. Homer, Jr.
Max H. Homer, Appellant

Sur Petition for Rehearing

Present: VAN DUSEN, ROSENN, *Circuit Judges* and CAHN, *District Judge*

The petition for rehearing filed by Max H. Homer, Appellant, in the above entitled case having been submitted to the judges who participated in the decision of this court and no judge who concurred in the decision having asked for rehearing, the petition for rehearing is denied.

BY THE COURT,

.....
Judge

Dated: December 28, 1976

Appendix.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-1395

UNITED STATES OF AMERICA

v.

MAX H. HOMER
a/k/a Max H. Homer, Jr.
MAX H. HOMER, Appellant

Appeal from the United States District Court for the Western District of Pennsylvania
Crim. No. 75-227

Appendix.

Argued October 7, 1976

Before VAN DUSEN and ROSENN, *Circuit Judges,* and CAHN,* *District Judge*

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*Edward N. Cahn of the United States District Court for the Eastern District of Pennsylvania sitting by designation.

Opinion of the Court.

Opinion of the Court

(Filed Nov. 18, 1976)

PER CURIAM

The appellant, Max H. Homer, was tried by a jury in the United States District Court for the Western District of Pennsylvania and convicted on two counts of extortion in violation of the Hobbs Act, 18 U.S.C. §1951 (1970) (counts I and II of the indictment), and on one count of perjury in violation of 18 U.S.C. §1623 (1970) (count V of the indictment).[1] He appealed to this court assigning a number of errors committed by the district court during the course of the trial. We affirm the judgment of the district court.

Appellant, who during the time covered by the indictment against him represented the Stowe Rox area near Pittsburgh in the Pennsylvania House of Representatives, was charged in count I of the indictment[2]

1. Appellant was acquitted on four other counts charging attempted extortion, obstruction of justice, evasion of income tax, and false filing of an income tax return. The two remaining counts of the nine-count indictment were severed before trial.

2. Count I charged the defendant-appellant with extortion, in violation of 18 U.S.C. §1951 (1970), by using his official position as a member of the Pennsylvania House of Representatives "to wrongfully and unlawfully obtain and attempt to obtain property of the value of $6,500. . . . in the form of money and checks, from Thomas Gordon and Ralph Castellucci as agents and representatives of the . . . Gordon Terminal Service, Inc. with the consent of the said Thomas Gordon and Ralph Castellucci, said consent being induced . . . under the color of official right, and by the wrongful use of fear, in that the defendant did threaten the said Gordon Terminal Service, Inc., its agents and representa-

with extorting property "in the form of money or checks" from Gordon Terminal Service, Inc., ("Gordon") in violation of 18 U.S.C. §1951 (1970). Count II similarly charged appellant with extorting money under color of official right from Ruthrauff, Inc., in violation of 18 U.S.C. §1951.[3]

Count V of the indictment charged the appellant, who had appeared before a grand jury investigating alleged violations of section 1951, with testifying falsely concerning the Gordon transaction. Specifically, the indictment charged that appellant made a false material declaration to the grand jury when he testified on August 29, 1974, that he had requested Ernest Bulgarelli, a Safety Inspector for the Commonwealth of Pennsylvania, to furnish construction plans to J. J. Balobeck, the architect for the Gordon warehouse.

Inasmuch as the appellant challenges evidentiary rulings of the trial judge rather than the sufficiency of the evidence against him, we need not summarize the testimony adduced by the Government in support

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tives, with delay and denial of the right to occupy a new warehouse which was important to the continuation of the said corporation's business."

3. Count II charged the defendant-appellant with unlawfully obtaining and attempting to obtain, under color of official right as a member of the Pennsylvania House of Representatives, "property of the value of $3,010.92 . . . from Ignatius Laux, as an agent and representative of . . . Ruthrauff, Inc., with the consent of the said Ignatius Laux, said consent being induced . . . by the wrongful use of fear, in that the said defendant did threaten the said Ruthrauff, Inc. its agents and representatives, with delay and denial of the right to occupy a building which was important to the continuation of the business of the said Ruthrauff, Inc.," in violation of 18 U.S.C. §1951 (1970).

of the indictment. Appellant's principal contentions, both of which were briefed and argued orally on appeal, are that the district court erred: (1) in refusing the defense to call nine witnesses, each of whom would have testified that in 1971 he or she was told by Patsy Bruno, Treasurer of the Local Democratic Party Campaign Committee, that Gordon Terminal Service, Inc., had made a political contribution through the appellant, Max Homer, to the Democratic Party; and (2) in refusing to grant the appellant's motion for a mistrial because of the prosecution's improper closing argument to the jury.

I.

Appellant asserts that he had nine witnesses who were prepared to testify at trial that in 1971, when the offenses of extortion charged in count I of the indictment were alleged to have occurred, Patsy Bruno, the treasurer of the Stowe Rox Demorcatic Party organization for the 1971 general election, told each of them that Gordon had made a $5,000 political contribution to the Democratic Party through Homer.[4] Appellant contends this testimony, if beleived, would support his contention that he was not an extorter or income tax evader; the "open and well known disclosure of the receipt of monies was the core of appellant's defense and highly probative [of] his contention that such notoriety is at once utterly inconsistent with the conduct of one who is alleged to be an extorter or an income tax evader." Brief for Appellant at 9.

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4. Bruno died on July 2, 1973, more than two years before Homer's trial.

The trial judge ruled that he "might" permit the nine witnesses to be called in the event that the Government challenged a record of the Allegheny County Department of Elections which the defense had introduced into evidence and which listed the $5,000 contribution from Gordon as campaign income. Homer insists that the Government did in fact challenge this record at least three times. The appellant contends that during the cross-examination of Mrs. Patsy Bruno, widow of the party treasurer, the prosecutor asked a series of questions implying that the election record was incomplete and that the $5,000 contribution recorded in the county election report was never received by the Democratic Party. Homer alleges that another inferential attack on the completeness of the record occurred when he himself was cross-examined by the prosecutor. Finally, asserts the appellant, the Government challenged the election record in its closing to the jury, when the prosecutor argued that Patsy Bruno's personal records showed no receipt of $5,000 from Homer or from anyone else. Homer therefore concludes that the condition set by the trial judge for the admission of the testimony of the nine witnesses was met and that the judge erred in excluding it. In addition, the appellant maintains that the testimony of those witnesses was admissible under Rules 804(b)(3), 804(b)(5), and 803(24) of the Federal Rules of Evidence.

The trial judge excluded the testimony of the nine witnesses for two reasons. First, he had already allowed the defense to introduce a photocopy of the official election record, signed by Bruno, which reflected the information to which the nine witnesses would purportedly have testified. Second, he found that the

testimony lacked the circumstantial guarantees of trustworthiness required by the Federal Rules of Evidence for the admissibility of such hearsay. Fed. R. Evid. 803(24), 804(b)(3), 804(b)(5).

We need not decide whether the hearsay testimony of the nine witnesses was admissible under Rules 803(24), 804(b)(3), or 804(b)(5). That testimony was offered not as a defense to the extortion counts on which the appellant was convicted, but solely as a defense to the income tax evasion charges of which he was acquitted. In arguing for the admissibility of the testimony, defense counsel described the specific purposes for which it was offered:

> This is the defense to the income tax count. If he [Homer] did not use, and if he took the money by extortion under the most gross circumstances and gave it to the nunnery, he wouldn't be guilty of income tax evasion but might be guilty of extortion.

Inasmuch as the appellant was acquitted of the income tax evasion counts, we find no reversible error in the exclusion of testimony offered as a defense to those charges.[5] Moreover, evidence that Homer received the $5,000 from Gordon and delivered it to the local party treasurer is not probative of the charge that Homer exacted the money by extortion.

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5. *Cf.* McCormick's Handbook of the Law of Evidence §52, at 112 n.15 (2d ed. E. Cleary 1972) ("[I]f a specific ground for admission is claimed in the offer of proof but is not applicable and the judge excludes the evidence, the proponent cannot complain if there was another ground for admission."); cases cited in J. Wigmore, Evidence §17 at 81 (W. Reiser ed. Supp. 1975).

II.

The appellant's contention that the trial judge erred in refusing to grant the defense motion for a mistrial is based on the following comment in the prosecutor's closing argument:

> Now this is a sensitive and important case, as Mr. Greenfield [defense counsel] told you, in more than one way. It is an important case because people are watching. There is a precedent going to be set here. People will want to know if they are going to be free from these oppressive tactics we have seen.
>
> We ask you to find the defendant guilty on all counts in the indictment, and by doing that, you will get a message across to all other people who would seek to use the power of their office to abuse it, if you will, under color of official right in instilling fear in business, that we are not going to stand for it, that the citizens and taxpayers are not going to stand for it, it has to stop now.

Citing the American Bar Association Standards Relating to the Prosecution Function[6] and cases con-

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6. Standards 5.8(c) and (d) of the American Bar Association Standards Relating to the Prosecution Function provide:

> 5.8(c) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.
>
> 5.8(d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.

struing language allegedly similar to that used by the prosecutor in the instant case, appellant argues that the foregoing comment introduced "facts beyond the record, and [tended] to cajole or coerce [the] jury merely for the sake of public approval."

In the recent years we have had the occasion to admonish counsel for thoughtless and inappropriate remarks made in the course of heated and vigorously contested trials. At times, extemporaneous comments in a closing argument may exceed the bounds of good taste or propriety without necessarily rising to the level of reversible error. At other times, the comments are so grossly improper as to prejudice a defendant and deny him a fair trial. We have held remarks reflecting the prosecutor's personal opinion on the guilt of a defendant based on evidence not in the record to be per se reversible error. *United States v. Schartner,* 426 F.2d 470, 478 (3rd Cir. 1970); *see United States v. Benson,* 487 F.2d 978, 981 (3rd Cir. 1973). This, however, is not such a case.

We acknowledge that the prosecutor's remarks were rash and inappropriate. As we have previously stated, however,

> [t]rials are rarely, if ever, perfect and improperieties of argument by counsel to the jury do not call for a new trial unless they are so gross as probably to prejudice the defendant and the prejudice has not been neutralized by the trial judge before submission of the case to the jury.

United States v. Leftwich, 461, F.2d 586, 590 (3rd Cir.), *cert. denied,* 409 U.S. 915 (1972). *Accord, United States v. Somers,* 496 F.2d 723, 737 (3rd Cir.), *cert. denied,*

419 U.S. 832 (1974): "[W]e will reverse upon demonstations of prosecutorial misconduct only in those situations in which prejudice inures to the defendant from the challenged improprieties." Our awareness of the nature of opening and closing arguments in an adversary proceeding and our concern for judicial administration precludes us from setting aside a verdict and ordering a new trial every time an advocate is verbally indiscreet unless his remarks are obviously prejudicial. In recent years this court has found prosecutorial conduct improper but not prejudicial in a number of cases. *See* cases cited in *United States v. Somers,* 496 F.2d at 736 n.24.

The prosecutor's questionable comment constituted two small paragraphs in the sixty pages of his closing argument. He had previously cautioned the jury not to consider his remarks as evidence. The remarks were not so shocking as to suggest to the defense that it seek curative instructions immediately. Moreover, in response to defendant's subsequent complaint, the trial judge admonished the jury that they should determine the issues of fact "without bias or perjudice or sympathy as to any party." He further informed them that our legal system "does not permit jurors to be governed by sympathy, bias, or prejudice, or even public opinion." Finally, after admonishing the jury not to convict the defendant unless his guilt was proven beyond a reasonable doubt, the trial judge told the jury, "Keep constantly in mind you may not find the defendant guilty upon anything other than the evidence in this case."

We conclude that under these circumstances, the remarks of the prosecutor were not so pervasive, gross, or inflammatory as to constitute prejudicial error.

III.

We have also carefully considered each of the remaining contentions urged by the appellant and find them without merit, to-wit:

(1) that the court erred in refusing to permit the defense to call two witnesses, each of whom would have testified that he had been advised by one or more of the Ciamaccos that arrangements had been made to frame the appellant through the use of an oil company man and a heating and air conditioning man;[7]

(2) that the court erred in admitting the evidence of a One Thousand Five Hundred Dollar ($1,500) check made payable to Dr. Homer by J. J. Balobeck Associates, Government Exhibit 19;[8]

(3) that the court erred in refusing appellant's motion for mistrial when Government counsel cross-examined the appellant's witness, Beaver Parillo, on whether he and his brother were in debt for gambling;[9]

(4) that the court erred in permitting the case to be submitted to the jury on the theory of appellant's conduct while acting under color of official right;[10]

(5) that the court erred in failing to grant a severance of the extortion and false declaration counts.[11]

The judgment of the district court will be affirmed.

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7. *See* Donnelly v. United States, 228 U.S. 243, 273-77 (1913); United States v. Pena, 527 F.2d 1356, 1362 (5th Cir.), *cert. denied,* 44 U.S.L.W. 3738 (U.S. June 21, 1976) (discussing the requirements set out in Chambers v. Mississippi, 410 U.S. 284 (1973)).

8. United States v. Bloom, 482 F.2d 1162 (8th Cir. 1973).

9. Fed. R. Crim. P. 52(a).

10. United States v. Mazzei, 521 F.2d 639, 643 (3d Cir.), *cert. denied* U.S. , 96 S.Ct. 446 (1975).

11. United States v. Pacente, 403 F.2d 543 (7th Cir.), *cert. denied,* 419 U.S. 1048 (1974); United States v. Carson, 464 F.2d 424, 436 (2d Cir.), *cert. denied,* 409 U.S. 949 (1972).

Judgment.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-1395

UNITED STATES OF AMERICA
v.
MAX H. HOMER
a/k/a Max H. Homer, Jr.
MAX H. HOMER, Appellant

(D. C. Criminal No. 75-227)

On Appeal from the United States District Court
for the Western District of Pennsylvania

Present: VAN DUSEN and ROSENN, *Circuit Judges* and CAHN,* *District Judge*

Judgment

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed on March 12, 1976, be, and the same is hereby affirmed.

ATTEST:
THOMAS P. QUINN
Clerk

November 18, 1976

*Edward N. Cahn of the United States District Court for the Eastern District of Pennsylvania sitting by designation.

Memorandum Opinion.

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA
v.
MAX H. HOMER
Criminal No. 75-227

Memorandum Opinion

The above-named defendant was convicted of three counts of a nine-count indictment by a verdict of a jury after a twelve day trial. The counts on which he was found guilty involved two charges of violation of the Hobbs Act (18 U.S.C. 1951) by extorting money in such a way as to obstruct, delay or affect interstate commerce and one count of a false declaration to a Grand Jury (18 U.S.C. 1623).

The indictment originally contained nine counts. Count one concerned extortion from Gordon Terminal Services, Inc. Count two covered extortion from Ruthrauff, Inc., both business concerns located in McKees Rocks, Allegheny County, Pennsylvania. County three covered attempted extortion from a business concern operated by Frank Roman doing business as Rocks Plumbing and Heating Company. Count four covered obstruction of justice with respect to the testimony of one Ernest Bulgarelli an inspector for the Pennsylvania Department of Labor and Industry. Count five covered a false declaration to the Grand Jury relative to a request to Bulgarelli to furnish plans to one Joseph J. Balobeck in connection with the construction of a building for Gordon Terminal Service, Inc. Counts 7 and 9

covered evasion of income tax and filing a false income tax return for the year 1971. The original indictment also contains Counts 6 and 8 relative to income tax violation for the year 1968. By order dated June 9, 1975, Counts 6 and 8 were ordered severed, because in the opinion of the court they were not related to the extortion and other counts in the indictment, whereas Counts 7 and 9 were related to the obtaining of extortion money during the year 1971. There has as yet been no trial with respect to the charges contained in Counts 6 and 8. To avoid confusing the jury, Counts 7 and 9 were renumbered as Counts 6 and 7 for the purpose of this trial.

The jury, after lengthy deliberations, convicted the defendant on Counts 1, 2 and 5, but acquitted him on Counts 3, 4, 6 and 7.

The defendant has filed a motion for new trial or for judgment of acquittal with respect to this conviction on the three counts, 1, 2 and 5. The defendant did not argue that there was insufficient evidence to convict him of extorting money from the two firms named (hereinafter referred to as Gordon Oil, mentioned in Count 1 and Ruthrauff, referred to in Count 2), if the court's interpretation of the Hobbs Act 18 U.S.C. 1951 applying the decision of the Court of Appeals for the Third Circuit in United States v. Mazzei, 521 F 2d 639 (3d cir July 29, 1975) is correct. There was ample evidence from which the jury would have been justified in finding that both of these firms had sufficient nexus with interstate commerce to meet the test in Mazzei, supra. United States v. Addonizio, 451 F 2d 49 and United States v. Staszcuk, 517 F 2d 53 (7th cir 1975). The evidence, if believed by the jury, as it obviously was, indicated that with respect to Gordon Oil the defendant at the time

in question, viz: April through July, 1971, being a member of the House of Representatives of Pennsylvania, did extort the sum of $6500 from the representatives of Gordon Oil for the purpose of securing a permit to occupy a new building erected by them and then ready for occupancy subject to the approval of the Pennsylvania Department of Labor and Industry. Bulgarelli was an inspector for this department for whom the defendant had secured his job. The government's evidence also indicted the plaintiff also extorted the sum of $3,010 from one Laux, representative of Ruthrauff, who also had a need to occupy a new building and as to which the occupancy was questioned by Bulgarelli.

Following the jury's verdict which was rendered on August 21, 1975, the defendant filed a motion for judgment of acquittal or in the alternative for a new trial on August 29, 1975, which alleges various errors made during the trial and also claims judgment of acquittal should be granted because the evidence did not show that defendant was acting under color of official right as required by the provisions of 18 U.S.C. 1951.[1]

Under Rules 29, 33 and 34 of the Federal Rules of Criminal Procedure, motions for judgment of acquittal,

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1. *"Interference with commerce by threats or violence.*

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or *attempts or conspires* so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section —

* * *

for a new trial and in arrest of judgment must be made within seven days after verdict or "within such further time as the court may fix *during the seven-day period.*"

Under Rule 45(a), it is clear that the last day for filing such a motion was Thursday, August 28, 1975, and under Rule 45(b) the court has no power to extend the time for filing such motions. The court is therefore without authority to consider the original motion for judgment of acquittal or for new trial. See United States v. Johnson, 487 F 2d 318 (5th cir 1974); Rowlette v. United States, 392 F 2d 437 (10th cir 1968); United States v. Matthews, 335 FS 157 (W.D.Pa. 1971).

Defendant cites Hauger v. Hauger, 376 Pa 216, 101 A 2d 632 (1954) as standing for the proposition that procedural defects can be waived. Basically, that case holds that it is too late to raise procedural defects unobjected to after a sale in partition where a party does not find the result to his liking. It was not a criminal case and being a state case, this court is not bound by it in construing federal federal criminal rules which in no uncertain terms deny the court power to consider these motions or to extend the time after the lapse of seven days.

In any event, the court has examined the record and has found no substantial error to the prejudice of the legal rights of the defendant in the matters complained of in the original motion for new trial. With respect to the motions for judgment of acquittal the court finds that there was ample evidence to justify the

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2. The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

jury in determining that the defendant was acting under color of official right in receiving these payments from Gordon Oil and from Ruthrauff. Under United States v. Mazzei, supra, it was not necessary to determine that the defendant as a state legislator had the de jure power to dictate the holding up of occupancy permits for the new buildings which these business concerns had urgent need to occupy or to issue permits waiving certain alleged defects in the construction of the building. It was only necessary for the jury to determine that the businessmen in question had a reasonable belief that the state system so operated in the light of Bulgarelli's suggestion to them to see Homer and get the matter straightened out plus the fact that Homer had secured Bulgarelli's appointment as State Building Inspector. We therefore have a reasonable belief that the power in fact of defendant's office included effective authority to determine these matters and that exploitation of such a belief amounted to extortion under color of public office. That the defendant may have treated the sums received as political contributions or used them for other purposes is no defense and beside the point. See United States v. Trotta, 525 F 2d 1096 (2nd cir 1975).

This disposition of the original motion for new trial and for judgment of acquittal does not, however, solve the matters covered in the supplemental motion for judgment of acquittal or in the alternative for a new trial filed November 14, 1975. This motion raises the question of the effect of certain matters upon the jury's verdict and requires the court to determine whether or not such matters as are raised in the motion and the affidavits filed in this court raise circumstances under which impeachment of a jury verdict is allowed.

These items are covered in paragraphs 1, 2 and 3 of the supplemental motion. Paragraph 4 covers the question of severance of Counts 1 and 2 from Count 5 which is again a matter which should have been raised in the untimely motion for new trial and hence cannot be considered. United States v. Matthews, supra. In any event the court's memorandum and order of June 9, 1975, denying motion for severance except as to Counts 6 and 8 pertaining to unrelated income tax charges sufficiently covers this question.

Paragraph 5 of the supplemental motion relates to a lately discovered witness. It therefore appears that the matters raised in paragraphs 1, 2, 3 and 5 of the supplemental motion come within the "ground of newly discovered evidence" as a reason for new trial under Rule 33 which reasons can be raised at any time within two years. We will therefore now address ourselves to these matters, together with a motion still pending to quash a subpoena duces tecum against Roger Stuart, a newspaper reporter.

I. *Impeachment of Verdict.*

The supplemental motion in paragraphs 1, 2 and 3 allege that the deliberations of the jury were affected by the introduction of extraneous and impermissible matter prejudicial to the defendant, that certain jurors believed the defendant to be innocent but were told that the majority would prevail and that the majority believed the defendant guilty. For this reason, it is alleged that the jurors in question signed the verdict slip, that the verdict as signed by them and returned was not their verdict and that when they were polled these two jurors did not understand the questions being

asked and thought they were only being asked whether they were present. When they were sequestered for the night during deliberations, it is alleged that various jurors watched and heard news broadcasts concerning the trial of the defendant in violation of the court's instruction and that at least one juror was able to utilize the telephone in his room to communicate with his wife.

Fortunately, we have very clear guidelines recently established by the court of appeals for our circuit to deal with attempts to overturn a verdict on such grounds. In Government of the Virgin Islands v. Gerau, 523 F 2d 141 (3d cir Sept. 3, 1975) the court said:

> "Any attempt to impeach a jury verdict initially encounters two evidentiary obstacles: (1) producing evidence competent to attack the verdict, and (2) establishing the existence of grounds recognized as adequate to overturn the verdict. And even where both obstacles are cleared, there must be a finding that the party seeking to impeach the verdict has suffered prejudice from the misconduct of the jury.
>
> * * *
>
> "It is frequently said to be the rule that a juror may not impeach his own verdict once the jury has been discharged. McDonald v. Pless, 238 US 264 (1915). The rule was formulated to foster several public policies: (1) discouraging harassment of jurors by losing parties eager to have the verdict set aside; (2) encouraging free and open discussion among jurors; (3) reducing incentives for jury tampering; (4) promoting verdict finality; (5) maintaining the viability of the jury as a judicial decision-making body . . . The same accommo-

dation of policies produced the general rule's major exception, which provides that '[a] juryman may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind.' Mattox v. United States, 146 US 149 (1892), quoting Woodward v. Leavitt, 107 Mass 453. 'Extraneous influence' has been construed to cover publicity received and discussed in the jury room, consideration by the jury of evidence not admitted in court, and communications or other contact between jurors and third persons, including contacts with the trial judge outside the presence of the defendant and his counsel. By contrast, evidence of discussions among jurors, intimidation or harassment of one juror by another, and other intrajury influences on the verdict is within the rule, rather than the exception, and is not competent to impeach a verdict.

* * *

"Other than incompetency of a juror during jury service, see United States v. Dioguardi, supra at 79, and Jorgensen v. York Ice Machinery Corp., 160 F 2d 432 (2d cir 1947), these are all incidents of 'extraneous influence:' (1) exposure of jury to news items 'about the matter pending before the jury,' Remmer v. United States, 347 US 227 (1954); (2) consideration by the jury of extra-record facts about the case; (3) communications between third parties and jurors where relevant to the case to be decided; (4) pressures or partiality on the part of the court.

* * *

"As normal jury pressures and intra-jury influences may not be impeached by juror evidence, so also they constitute no grounds for overturning a verdict. See cases cited at notes 24 and 25, supra; United States v. Grieco, 261 F 2d 414 (2d cir 1958), cert. denied, 359 US 907 (1959). Nor, indeed, is a verdict invalid merely because the jurors' generalized knowledge about the parties, or some other aspect of the case, is an ingredient of the decision. Though 'the specific guarantees of an impartial jury and of confrontation,' as well as 'the more general one of due process,' proscribe consideration of specific extra-record facts about the case on trial, it is not necessary that the jurors be 'totally ignorant about a' case. United States ex rel Owen v. McMann, 435 F 2d 813 (2d cir 1970) cert. denied, 402 US 906 (1971).

"We cannot expunge from jury deliberations the subjective opinions of jurors, their attitudinal expositions, or their philosophies. These involve the very human elements that constitute one of the strengths of our jury system, and we cannot and should not excommunicate them from jury deliberations.

* * *

"The third-party communication cases break down, factually, into three major subclasses: (1) cases where jurors glean from non-jurors facts or opinions *concerning the liability or guilt of a defendant;* (2) cases involving attempts by outsiders to influence the verdict through intimidation or bribery of jurors; (3) cases where jurors come into personal contact with persons related to one side or

another of the controversy before the jury. See generally Comment, supra, at 366-69.

* * *

"Finally, were we to set aside the jury verdicts because of these rumors, we would be defeating the purposes served by the competency-sufficiency rules in this area of the law. See II-A, supra. If rumors such as these, filtering into the jury from no known source, were held sufficient to impeach these verdicts, jury tampering and harassment would be encouraged and we 'would add unduly to the already fragile state of criminal convictions.' McMann, supra, at 817.

* * *

"Even though a party establishes, by competent evidence, an act of jury misconduct sufficient to set aside a verdict, the verdict will stand unless the party has been prejudiced by the misconduct."

The Federal Rules of Evidence (effective July 1, 1975, and applicable here) also have very clear and succinct guidance of this kind. Rule 606(b) provides:

"Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occuring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about what he would be precluded from testifying be received for these purposes."

The circumstances sought to be used by the defendant to impeach the jury verdict fall into three general categories:

(1) failure of jurors to understand that the jury verdict had to be unanimous and failure to understand questions asked at the time of the poll,

(2) exposure to publicity, and

(3) extraneous remarks by certain of the jurors.

With respect to item (1), two of the jurors have made answers under oath to questions propounded by the attorney for the defendant and these have been filed as exhibits in this case. In general, they allege that the jurors did not hear the instructions that the verdict had to be unanimous, secondly, they did not agree with the verdict and thirdly, they did not understand what they were doing when they answered the questions on the poll. It is clear that these contentions fall within the category of impermissible impeachment of a verdict by a juror after the verdict has been rendered. If jurors were permitted to impeach their own verdict by statements such as these no criminal case would ever be ended, and the inducement would be great for defendants to engage in private interviews of jurors in an endeavor to get them to say that they did not understand the court's instructions which were clear and thus upset every verdict which was rendered. As a matter of fact, in the instant case the record indicates

that the defendant personally went to interview two jurors and thereafter his counsel and a court reporter put these jurors, Zacur and Wolf under oath and asked them questions which were later filed in court as exhibits. Such harrassment of the jurors after their verdict should not be tolerated. Such procedures can very easily degenerate into a situation with all kinds of subtle pressures being exerted. The court certainly would not tolerate the jurors being besieged by supporters of either side as they left the courtroom with harangues and threats. We recognize that jurors after completing their duties do have the right of free speech. We cannot muzzle them to prevent them from talking to whom they please. Here, however, the jurors were approached by persons who have lost the verdict in an endeavor to quiz them about their deliberations and whether or not they understood the court's instructions and the questions asked of them in the poll. It is apparent that if this continues in other cases particularly after the publicity received in this case with respect to this matter, it will have a chilling effect upon persons called to serve on juries if they are to be subjected to harassment of this kind. In the instant case, the court has received concerned inquiries from jurors other than the two involved inquiring why the court permits such questioning.

(1) *Failure to understand instructions.*

For the present, all we can say is that it is clear that the jurors' attempts to impeach their verdict in this case do not rise to the levels required for such purposes. As far as the jurors understanding the court's instructions, the court's instructions were clear. The court not only once but twice referred to the fact that

the verdict had to be unanimous.[2] The further statement that the jurors did not understand the questions asked at the time of the poll is also incredible. The transcript shows as follows with respect to juror Zacur.

> "*Mr. Greenfield*: May we poll the jury, Your Honor?
>
> "*The Court*: Yes. Mr. Finberg.
>
> "*Mr. Finberg*: I will read the verdict again. As to Count 1, Gordon, guilty; as to Count two, Ruthrauff, Guilty; as to Count 3, Roman, not guilty; as to Count 4, Bulgarelli, not guilty; as to Count 5, false declaration, guilty; as to Count 6, evasion of tax, not guilty; as to Count 7, false return, not guilty.

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2. "You will have the verdict slip with you. There is space for twelve signatures on it. *And as you know, the verdict of the jury is the unanimous agreement of all twelve jurors. All twelve of you must sign the slip.*

"You will fill in the date, and if you find the Government has failed to establish the factors mentioned as to any particular count, you will find the defendant not guilty on that count. If, however, you find the Government has proved its case against the defendant beyond a reasonable doubt on certain counts, then you will find the defendant guilty as charged on those counts.

"The verdict does not require any explanation of any kind by the jury. And you will see from the way we have set up the verdict slip that we instruct you to give a separate consideration to each of these counts and the testimony bearing upon it in arriving at your determination, *and make a finding specifically as to each count as you may agree by the unanimous finding of all members of the jury.*" (T. 1689) (Emphasis added)

"Juror No. 1, John Zacur, please rise. Is the verdict as read your verdict?

"John Zacur, Juror No. 1: Yes.

* * *

"*Mr. Finberg*: Bruce Wolf, Juror No. 9, is the verdict as read your verdict?

"Bruce Wolf, Juror No. 9: Yes."

(2) *Exposure to Publicity.*

The court, from the beginning of this case, repeatedly cautioned the jury not to listen to, read or watch anything appearing in the news media with respect to this case. It was not deemed necessary to sequester jurors in order to insure compliance with this instruction during the trial. The jury was, however, sequestered during deliberations when they had not reached a verdict at approximately 10:00 p.m. and were sent to a hotel for the night again with the caution not to observe the news media with respect to this case. Juror Wolf says in his answers:

"Q. To your knowledge did the jurors in any way look at newspaper accounts or see television on the trial as it was ongoing?

"A. Not to my knowledge. I will say that I watched television the night we were at Chatham Center (the hotel where the jury was sequestered).

"Q. Do you know whether any other watched it that night?

"A. I really couldn't say. John and I—we were in the same room. We laughed about it."

Juror Zacur says nothing about it. There is nothing in this to indicate that anything prejudicial was communicated to these two jurors if they did violate the court's instruction and watch television. There is nothing to indicate that anything they heard was anything more than a factual statement that the jury had retired for the night and would resume deliberations in the morning. Nor is there any showing that anything these jurors may have heard on television was communicated to the others. The same is true of the allegation that one juror called his wife.

(3) *Extraneous Matters Considered By the Jury.*

Juror Zacur says that when returning from lunch one prospective juror said he had a friend or relative who knew a state policeman in "Washington, Pennsylvania, or somewhere down there who said he heard that McKees Rocks were just a lot of racketeers." This person is identified as Allen Kiers, one of the jurymen selected. Zacur says that at no time was it indicated that Kiers had that view and the matter was dropped after that. He further states, however, during jury deliberations one girl said "Well, if does not get a guilty, he'll be out at the country club playing golf," and disparaging references were made as to other politicians. Juror Wolf says a couple of ladies said all politicians were crooks.

It should be noted that before trial the court conducted an individual voir dire of all the jurymen before the empanelling began. Each of the prospective jurors including Zacur, Wolf and Kiers was interrogated as to his knowledge of the case or anything he had heard about it, whether he had unfavorable opinions of those in political life or whether he knew of anything which

would prevent him or her from bringing in a fair and impartial verdict under the evidence and instructions of the court. Each answered, "No."

It is certainly the law that evidence from a juror cannot be received when it is offered to show matters which essentially inhere in the verdict itself. Domeracki v. Humble Oil and Refinery Co., 443 F 2d 1245 (3d cir 1970). We do not expect our jurors to be automatic robots with sterilized minds. They bring to the jury box a cross section of their experiences in life as experienced by any member of society. We cannot expunge from jury deliberations subjective opinions of jurors, their attitudinal mental processes or their philosophies. These involve the very human element that constitute one of the strengths of our jury system as a cross section of the community and we cannot and should not banish them from jury deliberations. D.V.I. v. Gereau, supra.

With respect to remarks of jurors in the jury room these matters inhere in a jury's verdict and a veil of secrecy and confidentiality must descend over them. "The jury's verdict of guilty cannot be impeached by the fact that a juror may have been influenced by the improper remark of a fellow juror. United States v. Blackburn, 446 F 2d 1089 (5th cir 1971). There is no showing that any jurors were improperly influenced by such remarks. Much of this would appear to be the ordinary give and take in discussions and arguments among jurors in the course of their deliberations.[3]

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3. The judicial rule against interrogating jurors as to their verdict except in cases of extraneous influences probably traces back to the landmark Bushel's Case, 6 Howell's State Trial 999 (1670). There it was held that a juror could not be fined for bringing in what appeared to the Crown to be a perverse verdict, in the trial of William Penn.

With respect to the remark made by Juror Kiers to Juror Zacur, there is no indication that Kiers harbored this view himself. There is no evidence that he or any other prospective juror said that the defendant Homer was a racketeer or that any of them replied untruthfully to the court's inquiry as to whether there was any reason why they could not bring in a fair and impartial verdict based upon the evidence and the instructions by the court. As a matter of fact, Zacur says that the matter was dropped after the original occurrence. (Zacur Affidavit, pg. 2).

The court further determines that there was no improper extraneous influence in watching a television newscast by two jurors contrary to the court's instructions and in a call, if made by one of the jurors to his wife to explain why he did not come home. There is no evidence that any such influence operated to bring about the verdict.

II. *Subpoena to Newsman, Roger Stuart.*

What the court has previously said concerning impeachment of the jury verdict clearly indicates the disposition to be made of the motion to quash the subpoena to Stuart, the writer for the Pittsburgh Press. The articles written by Stuart in the newspaper are before the court and also the questions and answers given by the jurors Zacur and Wolf to questions propounded by defense counsel at which Stuart was present. It does not appear that Stuart can add anything with respect to these matters. There is nothing in all the material submitted indicating that Stuart's information contains anything not heretofore discussed which if received would amount to a permissible impeachment of a verdict.

Stuart asked that the subpoena be quashed because in violation of the Pennsylvania Newspapers Reporters Privilege Act, 28 Purdon's PS 330 giving a reporter the privilege to refuse to disclose the sources of his information. We need not determine the extent to which the pleading of the so called Pennsylvania shield statute should be permitted in a criminal proceeding in federal court under Branzburg v. Hays, 408 US 665, 33 L. Ed 2d 626, 92 S Ct 2646 (1972). This court has previously ruled in United States v. Grosso, 72-102 Criminal (W.D. Pa 1973) that the shield statute should not be permitted to stand in the way where the inquiry goes to the heart of the matter in a criminal case in federal court, but the newsman should not be required to make disclosure where it appears that the subject to be disclosed is irrelevant or immaterial to the matter before the court. This it appears is true in this case.

Defendant argues that we cannot know what Stuart will say until he is put on the stand and under oath. To the extent, however, that the defendant seeks further information as to what Stuart may have elicited from inquiries among other jurors or unreported comments from jurors Zacur and Wolf this is tantamount to a mere fiishing expedition which the court should not permit since this only leads to further harassment of jurors after they have rendered their verdict. This the court considers potentially a danger to the due administration of justice and should only be permitted in case of clear evidence of misconduct. For the same reason, the court considers that nothing has been shown which would justify the court in requiring the jurors severally to appear to inquire into extraneous influences for other matters which adhere in their verdict. The motion to quash will be granted. See Cooper v. United States, ... F2d ..... (D.C. Cir 10/31/75).

III. *After Discovered Evidence.*

In the supplemental motion for judgment of acquittal or in the alternative for new trial filed November 14, 1975, the defendant in paragraph 5 asks for a new trial because of after acquired evidence set forth in an affidavit attached thereto.

The affidavit is made by one Barbara Serretti. The affiant states that she resided in McKees Rocks from 1964 until January 1972, across from the parking lot of the McKees Rocks plant of Ruthrauff, Inc., one of the two business entities from which extortion was claimed by the government. She says that she had become friendly with Mr. Laux, President of Ruptrauff, and Mr. Guthrie his Administrative Assistant. Laux was an important witness at the trial with respect to Count 2 of the indictment. She observed defendant Homer entering the main entrance to the Ruthrauff facility and that Guthrie explained that he was assisting Ruthrauff to obtain a permit so that Ruthrauff could commence its business operation. It was later stated that a permit had been obtained and that Homer was there attempting to persuade Ruthrauff to employ members of the McKees Rocks black community. She says that in April or May, 1971, she was visited by Guthrie and Laux who complained about Homer's attempts to persuade them to hire members of the black community, that they planned to make a financial contribution to be used for the benefit of the local black community and that this was the purpose of the contribution made to Homer. She further says that she moved to Fairmont, West Virginia, in January, 1972, and was not aware of the criminal proceedings against the defendant until she heard a newscast on August 21, 1975.

This type of evidence to contradict and impeach the testimony of witnesses Laux and Westman was already presented at the trial of this case by the defendant in the testimony of various other witnesses, to wit: Jones, Parilla and also the defendant himself. The jury to the contrary was convinced that this was not the purpose of the contribution and in any event this would not justify extortion.

It is apparent that if a new trial was awarded the effect of the Serretti testimony would only be further to contradict Laux and Westman and therefore would be cumulative only as to Count II of the indictment.

The general test to be applied in determining whether to grant a new trial on the basis of newly discovered evidence is that it must be of such a nature that it will probably produce an acquittal in the event of re-trial. See Moore Fed. Practice Rules of Criminal Procedure 33.04. Tests are set forth in Moore 33.03(1), namely, (1) the evidence must have been discovered since the trial, (2) failure to learn of the evidence at the time of trial was not due to defendant's lack of diligence, (3) it must be material to the issues of trial, (4) it must be of such a nature it would probably produce an acquittal in the event of re-trial. We assume that the evidence in question could not have been discovered with due diligence by the defendant at or before the time of trial. We hold, however, that the proffered Serretti testimony fails because it is merely cumulative or impeaching which is insufficient. See Messarosh v. United States, 352 US 1, 1 L Ed 2d 1, 77 S Ct 1, (1956) at page 9, citing United States v. Rutkin, 208 F 2d 647 (3d cir 1953). The court further holds that evidence of this nature since it has already been covered by at least three witnesses at the trial could not be said probably

to produce an acquittal in the event of new trial. In any event, it obviously has nothing to do with defendant's guilt under Count I. See also Giordano v. McCartney, 385 F 2d 154 (3d cir 1967).

For all of the above reasons, we will deny the motions for new trial or in the alternative for judgment of acquittal as filed by the defendant.

Order

AND NOW, to wit, February 26, 1976, for reasons set forth in the foregoing memorandum.

IT IS ORDERED that defendant's motions for judgment of acquittal or in the alternative for a new trial as filed August 29, 1975 and November 14, 1975 be and the same hereby are denied.

IT IS FURTHER ORDERED that the defendant appear for sentence before this court on *Friday, March 12, 1976, at 9:15 a.m.* A presentence report has already been received, but not yet examined, by the court.

United States District Judge
WILLIAM W. KNOX

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No. 76-1185

In the Supreme Court of the United States

OCTOBER TERM, 1976

MAX H. HOMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5a-15a) is reported at 545 F. 2d 864. The memorandum opinion of the district court denying petitioner's motion for a new trial (Pet. App. 17a-37a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 18, 1976 (Pet. App. 16a). A petition for rehearing was denied on December 28, 1976 (Pet. App. 4a). Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including February 26, 1977. The petition was filed on February 28, 1977, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial judge committed reversible error by refusing to allow nine witnesses to give hearsay testimony that the proceeds of petitioner's extortion scheme were used as a political contribution.

2. Whether the trial judge erred in refusing to admit hearsay testimony by two other witnesses regarding an alleged plan to frame petitioner.

3. Whether the court properly submitted the case to the jury under the theory that petitioner violated the Hobbs Act, 18 U.S.C. 1951, by extortion under color of official right.

RULE INVOLVED

Rule 804(b), Fed. R. Evid., provides in pertinent part:

> **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> * * * * *
>
> (3) **Statement against interest.** A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.
>
> * * * * *

> (5) **Other exceptions.** A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. * * *

STATEMENT

After a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted of two counts of extortion, in violation of the Hobbs Act, 18 U.S.C. 1951, and one count of perjury, in violation of 18 U.S.C. 1623.[1] Petitioner was fined $3,000 on each count, and was sentenced to concurrent four-year prison terms on the two extortion counts and to a consecutive four-year term on the perjury count. The court of appeals affirmed (Pet. App. 5a-16a).

The evidence at trial established that while petitioner was a member of the House of Representatives of the Commonwealth of Pennsylvania, he extorted funds from representatives of two companies—the Gordon Terminal Service Company ("Gordon Terminal"), and Ruthrauff, Inc. ("Ruthrauff")—both of which are located in McKees Rocks, Pennsylvania.

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[1]Petitioner was acquitted on four other counts charging attempted extortion, obstruction of justice, income tax evasion, and false filing of an income tax return.

In June 1971, Gordon Terminal, a chemical and petroleum processing company, was preparing to move a large quantity of materials into a newly constructed warehouse that was essential to the operation of its business (Tr. 250-251, 259-265, 378-379). At that time, a state safety inspector named Ernest Bulgarelli informed Thomas Gordon, an officer of the corporation, that because of minor construction defects the building could not be occupied (Tr. 379). Bulgarelli suggested that Gordon meet with petitioner for assistance (Tr. 197, 381), and a meeting took place attended by petitioner, Gordon, and Ralph Castelucci, the manager of the new Gordon Terminal warehouse (Tr. 251-252). Subsequently, petitioner demanded $15,000 to $20,000 to rectify Gordon's mistake of not supporting a political candidate. When Castellucci pleaded financial difficulties, petitioner agreed to accept a payment of $5,000 in cash, to be paid directly to petitioner, with another $1,500 to be sent to Balobeck Associates, a local company that performed no services for Gordon Terminal (Tr. 262, 295-296, 304, 322, 338, 389-393, 413).[2] After this payment to petitioner, no problems were encountered concerning occupancy of the warehouse (Tr. 294-297, 391-393).

In a similar transaction, petitioner extorted $3,010 from a representative of Ruthrauff, another local corporation. Ruthrauff also had an urgent need to occupy a new building that had been inspected and found unacceptable by Bulgarelli (Tr. 47-51, 74-91, 164-166, 176).

ARGUMENT

1. Petitioner asserts (Pet. 7-12) that the trial judge improperly refused to allow nine defense witnesses to

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[2]Originally, petitioner asked for a $1,500 check payable to a newspaper to which the local Democratic party owed an advertising bill.

give hearsay testimony that the late Patsy Bruno, treasurer of the local Democratic Party Campaign Committee, stated in 1971 that petitioner had told him that a $5,000 political contribution for the party had been received by petitioner from Gordon's company (Tr. 523, 704). The trial court excluded this testimony primarily because the defense had already introduced a notarized official election record signed by Bruno that reflected the same information (Tr. 715, 752-755, 1337-1338).[3]

There was no reversible error in this ruling. This evidence was offered as a defense to the income tax evasion charges of which petitioner was acquitted; he therefore may not now complain of its exclusion on the extortion counts on which he was convicted.[4] See Fed. R. Evid. 103(a)(2); see also *Shaw* v. *Scoville*, 369 F. 2d 909, 912 (C.A. 2). As the court of appeals stated (Pet. App. 11a): "Inasmuch as the appellant was acquitted of the income tax evasion counts, we find no reversible error in the exclusion of testimony offered as a defense to those charges." The evidence offered was not relevant to a defense to the extortion charge (Pet. App. 11a). That the proceeds of petitioner's extortion scheme may have been

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[3]In addition to the documentary evidence, three witnesses were allowed to testify that petitioner had informed them of a campaign contribution from Gordon (Tr. 940, 951, 992, 1360, 1369), and Bruno's wife testified that petitioner had given her husband a sum of money for campaign purposes (Tr. 779). In these circumstances, the testimony of the other nine witnesses would have been cumulative. See Fed. R. Evid. 403.

[4]In arguing for the admissibility of the testimony defense counsel described the specific purposes for which it was offered (Tr. 706):

> This is the defense to the income tax count. If he [petitioner] did not use it, and if he took the money by extortion under the most gross circumstances and gave it to the nunnery, he wouldn't be guilty of income tax evasion but might be guilty of extortion.

received for the benefit of a political committee, or treated by petitioner as a political contribution, does not lessen his culpability for extortion under the Hobbs Act. See *United States* v. *Trotta*, 525 F. 2d 1096 (C.A. 2), certiorari denied, 425 U.S. 971.

2. Petitioner also contends that the trial court's refusal to allow him an opportunity to present certain other hearsay evidence through two additional witnesses was reversible error (Pet. 12-14).

According to petitioner's offer of proof at trial, Michael Hamuicka and one additional defense witness, if permitted to testify, would have stated that in 1972 Hamuicka had a conversation with one Michael Ciamocco, Jr., a local gambling figure. Ciamocco allegedly wished to establish a "crap game" in Hamuicka's lounge, but Hamuicka refused, stating that if pressure were applied he would contact petitioner for assistance. Ciamocco then allegedly informed Hamuicka that petitioner would be of no value to him, because Ciamocco had made arrangements to frame petitioner through the use of an "oil man and a heating man" (Tr. 927-928, 932).[5] Petitioner argues (Pet. 12-14) that Ciamocco's statement concerning his role in an arrangement to frame petitioner constituted a declaration against Ciamocco's penal interest admissible under Rule 804(b)(3) of the Federal Rules of Evidence.[6]

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[5]Gordon Terminal was engaged in the business of oil storage and shipment (Tr. 246-247). The activities of Ruthrauff included the installation of heating equipment (Tr. 73).

[6]Ciamocco, when called as a witness at trial, invoked his Fifth Amendment privilege against self-incrimination and refused to testify (Tr. 1062-1064). He was therefore unavailable as a witness under the provisions of Fed. R. Evid. 804 (a)(1).

Rule 804(b)(3), however, contains the explicit caveat that such "[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." In this case, no corroborative evidence was offered to indicate the existence of any plot to frame petitioner. In addition, the circumstances surrounding Ciamocco's alleged statements indicated that they were not trustworthy. Thomas Gordon testified that he did not know Ciamocco (Tr. 425-426), and the manager of Gordon Terminal stated that while he knew the Ciamocco family, he had never discussed the matter with them (Tr. 330). Furthermore, the extortion of Gordon Terminal took place in 1971, and petitioner's offer of proof indicated that Ciamocco's intent to frame petitioner was expressed in 1972. No explanation was offered why the purported plot remained dormant until 1973, when the investigation of petitioner commenced (Tr. 1699-1700). Under these circumstances, the trial court properly excluded the hearsay evidence offered by petitioner.[7]

In any event, declarations against penal interest are admissible under Rule 804(b)(3) only if "a reasonable man in [the declarant's] position would not have made the statement unless he believed it to be true." This requirement is included in the rule because the statement against interest exception is "founded on the assumption that a person is

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[7]The trial judge stated that he would accept non-hearsay evidence indicating that a plan existed to frame petitioner (Tr. 1068):

> * * * I want to make it clear to the defendant that if he has any evidence that Laux [President of Ruthrauff] or Gordon or Castelucci [Manager of Gordon Terminal] were put up to frame this man, any direct evidence, either by them or by somebody who heard them say it, I don't regard that as being collateral to this case.

unlikely to fabricate a statement against his own interest at the time it is made." *Chambers* v. *Mississippi*, 401 U.S. 284, 299. This assurance of reliability is not present here since, as a practical matter, Ciamocco had much to gain from his statement. The offered proof described Ciamocco as seeking to pressure Hamuicka into accepting an illegal gambling operation in his establishment. Since Ciamocco was attempting to coerce Hamuicka into accepting his illicit dictate, he would have been expected to use any stratagem necessary, including the fabrication of a story designed to undermine Hamuicka's expectation of petitioner's help.[8] Evidence of Ciamocco's alleged statement was therefore properly excluded as unreliable hearsay (Tr. 932). See *United States* v. *Harris*, 501 F. 2d 1 (C.A. 9); *United States* v. *Pena*, 527 F. 2d 1356 (C.A. 5), certiorari denied, 426 U.S. 949.

3. Finally, petitioner asserts (Pet. 15) that the trial court erred in submitting the case to the jury under the theory that petitioner violated the Hobbs Act by extortion under color of official right. Petitioner does not detail the basis for this contention, but apparently seeks to raise the issue presented in *United States* v. *Mazzei*, 521 F. 2d 639 (C.A. 3), certiorari denied, 423 U.S. 1014—whether a state official without

[8]This case is thus unlike *Chambers*, *supra*, where this Court found that due process permitted the admission of certain statements against penal interest where the statements "bore persuasive assurances of trustworthiness," including the fact that the declarant "stood to benefit nothing" by his disclosures. 410 U.S. at 301, 302. *United States* v. *Iaconetti*, 406 F. Supp. 554 (E.D. N.Y.), also relied on by petitioner, involves the application of Fed. R. Evid. 803(24) to the particular facts of that case. In addition, the statement there was made "close on the heels of the criminal event and to persons with whom it was appropriate and even necessary to communicate." 406 F. Supp. at 559. By contrast, the extortion events here occurred in 1971, the conversation allegedly indicating the plot to frame petitioner took place in 1972, and the investigation and prosecution were not initiated until 1973.

power to confer the benefit sought may be found guilty of extortion under color of official right under the Hobbs Act in circumstances where the official exploited the victim's reasonable belief that the official possessed that authority. For the reasons discussed in our Brief in Opposition in *Mazzei* (No. 75-313, October Term 1975), this issue does not merit further review.[9]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1977.

[9]We are sending petitioner's counsel a copy of our Brief in Opposition in *Mazzei*.

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